IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 456

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, *et al.*,
Petitioners,

v.

CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,
Respondents.

PETITION FOR REHEARING

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SUBJECT INDEX.

Citation of Cases.

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PETITION FOR REHEARING

Pursuant to Rule 33 of this Court, Petitioners pray for a rehearing, and a reversal of the order entered on February 7, 1949, denying their petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit. In conformity with that rule, Petitioners are confining this petition to grounds available to them although not previously presented, based on *conflicting* Circuit Courts of Appeals decisions on a question of transcendent general importance embraced in the first question presented in their petition for a Writ:

> WHEN A WRITTEN REQUEST OR PRAYER FOR INSTRUCTIONS HAS BEEN SUBMITTED TO THE TRIAL JUDGE, FULLY DISCUSSED AND ARGUED, AND UNQUALIFIEDLY DENIED, PRIOR TO THE CHARGING OF THE JURY, IS AN EXCEPTION REQUIRED, UNDER FEDERAL RULE OF CIVIL PROCEDURE NO. 51, TO THE COURT'S DENIAL OF THE PRAYER OR HIS

FAILURE TO COVER IT IN HIS CHARGE; OR IS THE RULING, AND ALSO THE EXCLUSION OF THE PRAYER FROM THE CHARGE, GOVERNED SOLELY BY RULE 46, PROVIDING THAT NO EXCEPTION OR OBJECTION IS NECESSARY IF THE PARTY, AT THE TIME OF THE RULING, MAKES KNOWN TO THE COURT THE ACTION HE DESIRES IT TO TAKE?

Decisions of the various Circuit Courts of Appeals bearing on this question, several of which Petitioners cite below, reveal a wide diversity and conflict of opinion thereon. Some hold, *in line with Petitioners' view*, that it would be a meaningless gesture, not contemplated by Rule 51, to except to the Court's failure to cover in his charge a prayer he had previously pronounced an incorrect statement of the law and unqualifiedly rejected; others that, in order to preserve the question for appeal, an exception, stating grounds, must be taken to anything in the Court's charge deemed defective, whether the point has been previously passed upon or not. Some hold that *Rule 46 alone* applies to such a situation; others, *Rule 51;* and at least two, that both rules must be read together, and that, under circumstances such as are here presented, no exception is necessary, *either to the Court's ruling or his charge*. The latter conclusion seems to Petitioners the most logical and reasonable; and it is probable that the confusion that the opinions disclose has existed in the lower Federal courts ever since the new rules were promulgated, concerning the proper application of the two rules, would have been less had the two been made sections of one rule governing exceptions and objections.

Yet, notwithstanding that the question here raised has been passed upon, *in conflicting decisions*, many times in the several Circuits, and over the whole period of a decade

since the present Federal rules were adopted, it has been brought before this Court for the first time in the case at bar, so far as Petitioners can learn. It follows, therefore, that unless this Court undertakes, by a decision in this case, to resolve the conflict of opinion as to the application of these highly important rules to such a situation as is here presented, many more years may elapse before it again may have an opportunity to do so.

THE RULING OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR

The ruling of the United States Court of Appeals for the District of Columbia Circuit in this case on the question here presented is not only *in conflict with those of other Federal Circuit Courts*, BUT IN CONFLICT WITH THE VIEW OF THAT COURT ITSELF ON THE POINT, IMPLIED IN AT LEAST TWO PRIOR DECISIONS, as will be shown.

In passing on Petitioners' contentions that the trial judge had erroneously denied their Prayers Nos. 2 and 7 (R. 18, 21, 22), on the *presumptions* of undue influence and testamentary INCAPACITY, respectively (raised by certain uncontradicted facts in evidence which had been previously held in this jurisdiction, and are generally held elsewhere, to raise such presumptions), our Circuit Court in its opinion (R. 187, 188) expressly declined to decide whether or not the prayers correctly stated the law, but ruled that it was not error to deny them because, the opinion states, the trial judge's charge on the *issues* of undue influence and testamentary CAPACITY in this will-contest case was correct; *although the charge contained not a word concerning such presumptions*, and was throughout a general charge, nowhere directed to the particular facts in the case.

It is very important to note, in this connection, that the Circuit Court's opinion (R. 187), and all the official reports on this case, consistently INCORRECTLY state that Prayer No. 7 (R. 21, 22) is on the presumption of Testamentary CAPACITY, rather than, as the prayer clearly indicates, on the presumption of testamentary INCAPACITY. By way of emphasizing the theory of the prayer, there is a reference at its start to the presumption of testamentary capacity, followed by the adversative conjunction "BUT" and the prayer defining the situation raising the presumption of testamentary INCAPACITY. It is difficult to understand how the import of the prayer could have been so misconstrued or why it could be believed that a caveator would offer a prayer on the presumption of testamentary CAPACITY.

On the question on which this petition is based, our Circuit Court further said, in connection with the prayers, that SINCE IT DID NOT APPEAR THAT ANY EXCEPTIONS HAD BEEN ASSERTED BY PETITIONERS TO THE CHARGE "ON THESE POINTS", THEY COULD NOT "NOW BE URGED" BEFORE THAT COURT.

This ruling, Petitioners contend, is in conflict with that Court's earlier decision on the point in *Crockett Engineering Co. v. Ehret Manufacturing Co.*, (1946), 156 F. 2d 817, wherein Judge Prettyman in effect held Rule 51 applicable to a prayer *granted*, but not to one *denied*, as appears from the excerpt:

> "At the conclusion of the testimony the court *granted* the following prayer of Crockett's counsel: * * * This prayer * * * was not included verbatim in the court's charge to the jury."

After finding that the prayer had been substantially covered in the Court's charge, the opinion continues:

> "Moreover, we would be constrained to reach the same conclusion because of Rule 51 * * *. Crockett's counsel raised no timely objection to the insufficiency of the charge as given, nor to the court's failure personally to instruct the jury according to the terms of his Prayer No. 4."

Judge Prettyman then takes up and passes upon the appellant's contention that his Prayer No. 7, "*denied* by the Court below, *should have been granted,*" and finds that it was properly denied; *making no reference to Rule 51, as he did concerning Prayer No. 4,* and thus impliedly holding that no exception to the trial court's failure to instruct the jury according to the terms of the *rejected* prayer was necessary, and that the denial of this prayer was governed by Rule 46.

Also, to the same effect, *Lippman v. Williams,* (U. S. App. D. C. 1944), 147 F. 2d 151:

> "The appeal here is based alone on the *rejection* by the court of three instructions requested by appellants."

The opinion then considers at length the three rejected instructions and rules them properly denied and then states:

> "The *general charge* of the court may not have been most happily phrased, but since *it* was not objected to, we cannot consider it."

This decision, too, by implication holds that, while an exception is required to preserve objections to a general charge, none is required to *a prayer denied.*

> Cf. *Cohen v. Evening Star,* (U. S. App. D. C. 1940), 113 F. 2d 523.

As illustrating *the diametrically opposite conclusions* reached on this question by some of the other Federal Circuit Courts, Petitioners here cite, first, those supporting

Petitioners' view, and follow with those agreeing with the ruling of our Circuit Court in the case at bar. A survey of the cases passing upon the two rules indicates that the majority holding exceptions or objections, stating grounds, to be required under Rule 51 deal with a ruling granting a motion or a prayer adverse to the appellant's contentions; or a charge omitting the appellant's granted prayer or considered by the appellant insufficient or erroneous. Petitioners do not question that to any such situation Rule 51 applies; but they respectfully insist that as to a ruling denying *in toto* a tendered prayer, *Rule 46 alone* governs, and that, *since the prayer itself (and in this case the discussion concerning it) has made known to the Court the action desired,* no exception or objection to either ruling or the Court's charge failing to cover the prayer is required.

OTHER FEDERAL CIRCUIT COURTS SUPPORTING PETITIONERS

Sweeney v. United Features Syndicate, Inc. (2nd Circ., 1942), 129 F. 2d 904:

> "Although the plaintiff took no formal exception to such refusal, he now seeks to predicate error upon the *refusal to charge* plaintiff's request No. 12: * * * The defendant has taken the position that the *denial* to charge this request is not properly before the court because the record on appeal does not show any exception taken as required by Rule No. 51 * * * It is unnecessary to pass upon the motion to amend the record since we may *consider the refusal to charge as requested in these circumstances even though no formal exception appears in the record.* * * * The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings and if necessary correct them. * * * *Here it appears that there was full discussion of the point raised which adequately informed the court as to what the plaintiff contended was the law,* and the entry of a formal exception after that would have been a mere technicality. *Those cases construing Rule 51*

strictly all involve situations where no indication was given to the judge that error would be assigned to his ruling."

Williams v. Powers (6th Circ., 1943), 135 F. 2d 153:

"The points assigned by appellant * * * 1. The correctness of the charge to the jury in connection with contributory negligence, which was offered by appellee * * *. 2. The *refusal* of the court to instruct the jury at the request of appellant as follows: * * * *Appellee insists that appellant has waived the error on which he now relies because of his alleged failure to comply with * * * Rule 51 * * *.* There appears in the record a statement by the trial judge that before the jury retired the attorneys for the respective parties discussed with him in chambers the requests of each of them, and at the conclusion of this discussion the trial judge *denied all of appellant's requests* and all of appellee's requests except * * *. *Rule 46 * * * modifies the previous practice of formal exceptions to rulings or orders of the court and makes it sufficient for review* that at the time the ruling or order of the court is made or sought, the party makes known to the court the action which he desires the court to take *or* his objection to the action taken and his ground therefor. *Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient.* * * * In our opinion we should consider the objection of appellant to the instruction given."

Cf. *Hower v. Roberts* (8th Circ., 1946), 153 F. 2d 726, citing the Williams case.

Union Pacific Co. v. Owens (9th Circ., 1944), 142 F. 2d 145:

"The prime reason for Rule 51 is that the trial judge shall be informed of any error in the instruction that he may correct it before the case is submitted to the

> jury. *It will be seen that the point has been made. The court, therefore, was well aware of the claimed error when it gave its instructions and refused the proposed instruction.*" Held that no exception to the charge was required.

United States v. Barndollar (10th Circ., 1948), 166 F. 2d 793:

> (Referring to Rule 46) "In order to preserve a question for review on appeal, a litigant is required to make known to the court the action he desires taken *or* his objection to the action taken and his ground or grounds therefor. * * * Here the complaint and the statement of counsel made early in the trial *left no room for oversight or doubt,* * * * *and that was sufficient to preserve for review the correctness of the action of the court* * * *.*"

Also, *Monaghan v. Hill* (9th Circ., 1944), 140 F. 2d 31, holding that there is no need for formally expressing objections to the Court's ruling where the Court knows that it does not agree with the party's opinion as to what he is entitled to.

United States v. Rayno (1st Circ., 1943), 136 F. 2d 376:

> "The court then called counsel to the bench and after some colloquy the United States Attorney began to take his exceptions to the failure of the court to charge as he had previously requested in writing. * * * No point is made that his objection was not sufficiently specific * * *. *Nor do we think that the point, if made, would be good because* * * * *the court must have been well aware of the legal theory upon which the United States Attorney wished to have the case submitted to the jury.*"

Cf. *Mass. Bonding & Insurance Co. v. Preferred Automobile Ins. Co.* (6th Circ., 1940), 110 F. 2d 764; *Ulm v. Moore-McCormack Lines, Inc.* (2nd Circ., 1940), 115 F. 2d 492; *Evansville Container Corp. v. McDonald* (6th Circ., 1942), 132 F. 2d 80; *Alaska Pac. Salmon Co. v. Reynolds Metals Co.*, (2nd Circ., 1947), 163 F. 2d 643.

CONTRARY DECISIONS OF OTHER FEDERAL CIRCUIT COURTS

Blair v. Cullom (2nd Circ., 1948), 168 F. 2d 622:

> "Appellant charges that certain portions of the charge were erroneous. The record, however, shows that, when asked if there were any exceptions to the charge as given, appellant's counsel replied, *'No exceptions, your honor.'* If we take the record on its face, therefore, Rule 51 * * * precludes appellant from claiming any error on appeal, *unless, as he argues, the fact that he submitted his requests to charge at the opening of the trial avoids the operation of the rule.* * * * *It seems clear that Rule 51 applies and requires objection to those parts of the charge claimed to be erroneous, whether or not requests to charge have been submitted.*"

Reeves Bros. v. Guest (5th Circ., 1942), 131 F. 2d 710:

> "Appellants complain of court's failure to give certain requested charges submitted by them. While the record shows that such charges were submitted to the court, *we have been unable to find the objections to the court's refusal to give the special requested charges as required by Rule 51.* * * * *The trial court's oral charge and failure to give the requested charges not being properly objected to below may not be made ground for reversal here.*"

On a petition for rehearing in the *Reeves* case (132 F. 2d 778), the Circuit Court passed on the rulings denying the requested charges because the unprinted record showed that the rulings had been objected to, and reversed the case.

Dommer v. Penn. R. Co., (7th Cir., 1946), 156 F. 2d 716:

> "Defendant urges that *two proffered instructions were erroneously excluded by the court.* We think that the defendant is precluded from questioning the court's action, as it failed to object thereto at the time of their exclusion. * * * Federal Rules of Civil Procedure, Rule 51 * * *."

To the same effect: *Colley v. Standard Oil Co. of N. J.* (4th Circ., 1946), 157 F. 2d 1007; also, *on this question, Tombigbee Mill & Lbr. Co. v. Hollingsworth* (5th Circ., 1947), 162 F. 2d 763.

It will be noted, moreover, that some of the cases just cited as being in accord with our Circuit Court's view in the case at bar on this question and contrary to Petitioner's, support their rulings with cases decided *before the new rules went into effect.*

Conclusion.

Since the current Rules of Federal Procedure emanated from this Court (under authority of 48 Stat. 1064, 28 U. S. C. A., Sec. 723, (b)), it is surely meet and proper that this Court, as the one of last resort, construe those (such as Rules 46 and 51, herein referred to), that decisions of the Federal Circuit Courts show are being *conflictingly interpreted* by them. It is particularly desirable as to Rule 46, which marks a novel and radical departure from the long-established and deeply rooted practice requiring exceptions in all cases, and which enters into practically every matter that comes before a District Court. This rule, along with Rule 43, governing evidence, and the rules on discovery, is obviously designed, and should be applied, to get around those rigid procedural barriers which have so often in the past barred the just determination of a case.

The ruling of our Circuit Court on the question here presented, and others herein cited in line with it, disregard the benevolent intent of the new rules to unfetter court procedure of ancient technicalities in the interest of truth and justice, and tends to preserve the old order. As was said in *Victory v. Manning* (3rd Cir., 1942), 128 F. 2d 415.

"The general policy of the rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants." And such decisions are not in keeping with this Court's own more recent decisions; for example, *Hickman v. Taylor*, 329 U. S. 459, of which case this Court took cognizance to construe the rules of discovery more liberally than the lower courts had done. It is suggested, and most respectfully urged, that, in the same spirit and in the interest of uniformity in the Federal Circuit Courts (over which this Court has supervisory responsibility) upon this important question of general interest, this court of last resort should consent to pass upon it and thus set all the lower Federal Courts upon the right road; rather than, by declining to take jurisdiction, tacitly to permit them to pursue the widely divergent paths they are now following on the point, often to the great detriment and expense of litigants and lawyers.

THEREFORE, it is respectfully prayed that this petition for rehearing be granted and, upon rehearing, that the order of this Court denying the petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit, be reversed and the said petition be granted.

Respectfully submitted,

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NOTE: *Italics supplied.*

CERTIFICATE.

Counsel for petitioners certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

LUTHER ROBINSON MADDOX.